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MAY 27 1983
ALEXANDER L. STEVAS,
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No. 82-1674

In the Supreme Court of the United States

OCTOBER TERM, 1982

IRVING S. LEVINE, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether the lower courts correctly determined that petitioners were not entitled to deduct as medical expenses under Section 213 of the Internal Revenue Code of 1954 (26 U.S.C.), the costs they incurred in renting an apartment for their son and otherwise supporting him while he was being treated for mental illness on an out-patient basis away from his home.

The facts of this case may be summarized as follows: After petitioners' son, Guy Levine, became too old to continue treatment for his mental disorder on an in-patient basis at the Menninger Clinic's Children's Hospital, petitioners, Guy and Guy's doctors explored alternative forms of treatment (Pet. App. 3a, 16a-18a). Other residential centers were unwilling to accept Guy for treatment and Guy was unwilling to consider relocating to these other institutions (Pet. App. 17a).

Petitioners therefore chose to have Guy continue individual psychotheraphy at the Menninger Clinic on an outpatient basis. Because petitioners did not live in Topeka, Kansas, where the clinic was located, they arranged for Guy's housing, transportation and maintenance while he was in Topeka.[1] Accordingly, petitioners retained a local attorney, Arthur Glassman, to act as their and Guy's representative to assist and supervise Guy in arranging the details of his living arrangements (Pet. App. 3a, 19a).

Petitioners and Glassman, using petitioners' funds, rented for Guy a furnished, efficiency apartment, and Glassman thereafter disbursed petitioners' funds to Guy to buy groceries, clothes, gasoline for his automobile and whatever else was required, and to pay Guy's rent, traffic tickets, utility bills, and other charges. Glassman also helped Guy find employment, arranged for automobile insurance coverage, hired a cleaning woman to maintain Guy's apartment and generally acted as a surrogate parent for Guy. In order to discharge his duties, Glassman generally met with Guy no less than once a week (Pet. App. 3a, 20a-21a).

The apartment rented for Guy had no special medical furnishings of any type and, indeed, except for one occasion, no medical treatment of any kind was given to Guy there. Nor were Guy's activities in the apartment subject to any day-to-day medical supervision (Pet. App. 19a-20a).

Petitioners sought to deduct as medical expenses the total costs of supporting Guy and the fees paid to Glassman. The Commissioner disallowed the bulk of the claimed

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[1] At the time Guy was discharged from the Children's Hospital at the Clinic, the facility had no apartment living plan. Guy would not have been accepted into the Adult Hospital's apartment living program because that program required a degree of self-sufficiency that Guy did not possess (Pet. App. 3a, 19a).

deductions[2] on the ground that the costs were not deductible medical expenses, but were non-deductible personal expenses (Pet. App. 33a). The Tax Court upheld the Commissioner. It concluded that because Guy's apartment was not specially equipped and no regular therapy or supervision was performed there, the costs of maintaining him in that apartment were no different from those incurred in maintaining a personal residence for him (Pet. App. 27a). The court also held that the managerial services provided by Glassman were not so "essentially bound up with Guy's medical care" as to warrant deduction as medical expenses (Pet. App. 33a). The court of appeals affirmed, stating that the "fine line of deductibility should be drawn based upon the principle that only those medically necessary away-from-home living arrangements which involve continuous daily medical care on the premises may give rise to favorable tax treatment for the cost of meals and lodging" (Pet. App. 9a).

1. The decision below correctly held that the expenses for room and board and the like incurred by petitioners in supporting their mentally ill son were not deductible as medical expenses under Section 213 of the 1954 Code

Section 213 of the Code, which allows a deduction for certain medical expenses, represents a narrow exception to the general rule established by Section 262 of the 1954 Code that no deductions shall be allowed for "personal, living, or family expenses." In the present circumstances, the costs at

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[2]The Commissioner permitted petitioners to deduct certain transportation expenses incurred for Guy's periodic visits to the clinic — generally for two 50-minute sessions weekly — and for Guy's occasional trips home. See Treasury Regulations on Income Tax (1954 Code), Section 1.213-1(e)(1)(iv) (26 C.F.R.).

issue in this case may only be deducted if they constituted "amounts paid * * * for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body * * *." Section 213(e)(1)(A).

Under longstanding Regulations, the cost of meals and lodging may be deducted as medical expenses only where an individual is in a hospital or similar institution and the principal reason for his presence in the institution is the availability of medical care in the institution. Treasury Regulations on Income Tax (1954 Code), Section 1.213-1(e)(1)(v) (26 C.F.R.). The extent to which costs for care in an institution other than a hospital constitute deductible expenses is a question of fact that depends upon the condition of the individual and the nature of the services involved, not the nature of the institution. Section 1.213-1(e)(1)(v). The authorities agree, however, that a person's living expenses while receiving *outpatient* medical care away from home are ordinarily not deductible as medical expenses. *Commissioner* v. *Bilder*, 369 U.S. 499, 501-504 (1962); *Montgomery* v. *Commissioner*, 428 F.2d 243, 245 (6th Cir. 1970); *Oliver* v. *Commissioner*, 364 F.2d 575, 578-579 (8th Cir. 1966); Section 1.213-1(e)(1)(iv) and (v).

As this Court recognized in *Commissioner* v. *Bilder*, *supra*, 369 U.S. at 501, under the predecessor to Section 213, many expenses incurred for meals and lodging while away from home for medical reasons were deductible as expenses for "medical care." But the draftsmen of the 1954 Code explicitly intended to change that rule. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A60 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 219 (1954). As the Court stated in *Bilder* (369 U.S. at 503): "* * * Congress' purpose to exclude such expenses [for meals and lodging] as medical deductions under the new bill is unmistakable in these authoritative pronouncements * * *."

While the principal focus of Congress' revision of the laws might have been, as petitioners contend (Pet. 20-24), on the "vacation-type" abuse prevalent under the predecessor to Section 213, the rule Congress adopted to counter the abuses was broader in scope. Thus, the House Report (H.R. Rep. No. 1337, *supra*, at 30) on the amendment states:

> A new definition of "medical expenses" is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, *but not the ordinary living expenses incurred during such a trip* (emphasis supplied).

See S. Rep. No. 1622, *supra*, at 219-220. To accomplish this result, Congress "enunciated the broad rule that the expenses of meals and lodging at a prescribed location do not constitute medical expenses unless incurred as part of a hospital bill," *Rose* v. *Commissioner*, 52 T.C. 521, 529 (1969), aff'd mem., 435 F.2d 149 (5th Cir. 1970), or in hospital-like surroundings, 52 T.C. at 529-530. Because the expenses here for meals and lodging were not part of a hospital bill or incurred in a hospital-like environment, the courts below correctly disallowed petitioners' deductions.

2. As petitioners note (Pet. 27-28), one appellate court has allowed a deduction for meals and lodging provided to a taxpayer in a "substitute institution" (*i.e.*, a hotel or apartment) while convalescing. See *Kelly* v. *Commissioner*, 440 F.2d 307 (7th Cir. 1971).[3] Contrary to petitioners' claim, however, there is no conflict between *Kelly* and this case.

In *Kelly*, the taxpayer had been in New York City on business when stricken with appendicitis. After surgery, but before he was well enough to return to his home, the

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[3] *Ungar* v. *Commissioner*, 22 T.C.M. (CCH) 766 (1963) is distinguishable on the same basis (see Pet. App. 7a n.1).

taxpayer was discharged from the hospital somewhat prematurely because of a shortage of hospital beds. He was, however, told to remain in New York for a time because of certain medical complications. He therefore rented a room in the city and received medical care in this room. See 440 F.2d at 311. Thus, the court in *Kelly* held that the hotel room rented by the taxpayer constituted in essence a substitute hospital room "because his condition is such that the availability of medical care * * * *in such institution* is a principal reason for his presence there" (Treasury Regulations, Section 1.213-1(e)(1)(v)(a); emphasis added). After determining that the situation there complied with the test set forth in the Regulation for the deduction of meals and lodging expenses while an individual is in an institution, the court in *Kelly* permitted the claimed deduction.[4]

As the court of appeals and the Tax Court below correctly noted (Pet. App. 6a-7a, 28a), the facts of this case are not "identical" to *Kelly*. In *Kelly*, the "taxpayer's condition caused him to stay in the hotel where he could receive continuous daily care in close proximity to his physician after being discharged prematurely from the hospital" (Pet. App. 6a). Here, however, during the two-year period involved, "Guy did not receive any medical care on the premises which [petitioners] would have [the court] view as

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[4]This same distinction applies to Rev. Rul. 69-499, 1969-2 Cum. Bull. 39, which held that the meal and lodging expenses of a mentally retarded individual in a specially selected private home were deductible (see Pet. 35). In the ruling, the patient was receiving treatment *in the home*. That was his only reason for being there.

Although Section 6110(j)(3) of the 1954 Code explicitly bars the use or citation of such documents as precedent, petitioners cite Private Letter Ruling # 7714016, IRS Let. Rul. Rep. (CCH) 1071-1072 (1977). The situation at issue in that ruling concerned a private halfway house regularly engaged in providing care. Accordingly, the ruling's conclusion that the costs of meals and lodging at the halfway house may be deducted is not inconsistent with the decision below.

a substitute institution" (Pet. App. 7a). The apartment had no special medical adaptations and no one supervised Guy on a day-to-day basis at the apartment (Pet. App. 7a). As the court concluded, "We do not reach the legal issue decided by the Seventh Circuit; in this case the deducted costs were incurred incident to services rendered, but unlike in *Kelly*, the services were not rendered *in* the alleged substitute institution" (Pet. App. 7a; emphasis in original).[5]

3. The courts below also correctly denied medical expense deductions for the amounts paid to the attorney Glassman. As the court of appeals properly recognized (Pet. App. 10a), legal expenses incident to medical care have only been allowed as a deduction when they are necessary to "legitimate a method of medical treatment." *Gerstacker* v. *Commissioner*, 414 F.2d 448, 453 (6th Cir. 1969). In *Gerstacker*, the taxpayer was allowed to deduct as a medical expense the legal fees incurred to establish guardianships which were required before taxpayer's wife could be involuntarily committed to a mental hospital. The court also held, however, that the legal fees attributable to management of the guardianship estate were not deductible, stating (*id.* at 453) "These services were not essential to legitimate the therapy and therefore lack the proximate relationship to the illness of Mrs. Gerstacker required for deductibility as expenses

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[5]See also *Estate of Levine* v. *Commissioner*, No. 82-4070 (2d Cir. April 11, 1983) (deduction denied for rehabilitative travel program for psychologically troubled daughter); *Volwiler* v. *Commissioner*, 57 T.C. 367 (1971) (deduction denied for an apartment and care for taxpayers' daughter who suffered from a mental disorder and used the apartment as a halfway house in her rehabilitation efforts); *Hunt* v. *Commissioner*, 31 T.C.M. (CCH) 1119 (1972) (deduction denied for cost of taxpayer's son residing with a foster family while receiving outpatient treatment at Menninger Clinic); *Allen* v. *United States*, 46 A.F.T.R.2d 5402 (Kan. June 20, 1980) (deduction denied for rental expenses for daughter's separate apartment although doctor recommended removal from family home).

for medical care." As the court of appeals pointed out (Pet. App. 10a), in this case Glassman's day-to-day management of Guy's affairs was not necessary to legitimate Guy's treatment but, rather, to manage his affairs during treatment. *Gerstacker* is therefore distinguishable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1983

DOJ-1983-05